

EPA's position is arbitrary and capricious and not in accord with the objectives of this Consent Decree and that Defendant's position will achieve compliance with the terms, conditions, requirements, and objectives of this Consent Decree, TSCA, the PCB regulations, the CWA, and Cressona's NPDES permit in an expeditious manner.

20. If Defendant fails to meet its burden of proof, Defendant shall pay the United States costs and attorney's fees incurred in responding to Defendant's petition.

## XII. RIGHT OF ENTRY

21. EPA and/or its representatives, oversight contractor, other contractors, and consultants, and attorneys for the United States shall have the authority to inspect the facility and surrounding location covered by this Consent Decree at all times for the purposes of:

1. monitoring the progress of activities required by this Consent Decree;
2. verifying any data or information submitted to EPA in accordance with the terms of the Consent Decree;
3. obtaining samples, and, upon request, splits of any samples taken by Defendants or their consultants; and
4. assessing Defendant's compliance with this Consent Decree, the PCB regulations, TSCA, the CWA and NPDES Permit No. PA0012726.

The United States' right of entry and authority to obtain information under this Consent Decree shall be in addition to, not in limitation of, all rights of entry and authorities to obtain information available under federal law.

22. In addition to the plans, reports, and other documentation required to be provided to EPA by Defendant under the terms of this

Consent Decree, Defendant shall also provide to EPA, upon EPA's request, any analytical data or any other documents that are, in EPA's judgment, necessary to evaluate proposals submitted by Defendant, to review work performed or to be performed by Defendant or to determine Defendant's compliance with the terms of this Consent Decree, including the corrective action plan, the PCB regulations, TSCA, the Clean Water Act and Cressona's NPDES permit.

**XIII. INSURANCE**

23. Defendant is solely liable for its acts or omissions in the performance of the work contemplated by this Consent Decree, or failure to perform fully or complete such work.

24. Defendant or its contractors, shall purchase and maintain in force insurance policies which shall protect and indemnify the United States against any and all liability arising from acts or omissions of the Defendant, its contractors or other agents in the performance of the work required by this Decree. At a minimum, defendant or its contractors shall obtain and maintain the following types of insurance policies:

A. Worker's Compensation as required by Pennsylvania state law;

B. Third-party liability coverage at least in the amount of \$3,000,000 per occurrence, with an aggregate of at least \$6,000,000 personal injury and property damage liability combined. Such coverage shall apply to risks typically insured under comprehensive general liability and automobile liability policies.

25. Fifteen (15) days prior to commencement of work at the facility, Defendant shall provide EPA with certificates of insurance and a copy of the insurance policies for EPA's approval.

**XIV. FINANCIAL RESPONSIBILITY**

26. By the date of Cressona's execution of this Consent Decree, Defendant shall submit to the United States for approval an assurance of its financial ability to meet the current cost estimate for the Compliance Requirements (as specified in Section V of this Consent Decree), including both capital and operation and maintenance costs ("Current Cost Estimate"), estimated to be at least \$5,000,000. Defendant shall update this assurance of its financial ability to meet the Current Cost Estimate ("Financial Assurance") annually to take into account the rate of inflation, as set forth in Paragraph 28, below. Defendant's Financial Assurance shall be in one (or a combination) of the following forms:

- a. A surety bond guaranteeing performance of the Compliance Requirements;
- b. One or more irrevocable letters of credit equalling \$5,000,000, or a lower amount equal to 100% of the cost estimate for completion of all remaining compliance requirements in Section V of this Decree, as approved by EPA in its sole and nonreviewable discretion. Cressona shall submit to EPA for approval, annually, beginning January 1, 1994, revised cost estimates for use in determining financial assurance requirements. Such revised cost estimates shall account for inflation in accordance with Section XIV, paragraph 28, of this Decree; or
- c. A demonstration that Respondent satisfies the requirements of the financial test set forth in Paragraph 27 of this Section.

27. If Defendant seeks to demonstrate Financial Assurance through the financial test, as discussed in Subparagraph 26.c of this

Section, it shall provide the United States with a letter from its chief financial officer (supported by the previous five years of annual audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP")) certifying that Respondent has:

- a. Two of the following three ratios: a ratio of total liabilities to net worth of less than 2.0; a ratio of the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
- b. Net working capital and tangible net worth each at least six times the sum of the Current Cost Estimate of \$5,000,000; and
- c. Tangible net worth of at least \$10 million; and
- d. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Current Cost Estimate of \$5,000,000.

28. Annually, on the anniversary of Defendant's receipt of notification of the United States' approval of the Financial Assurance required in Paragraph 26 of this Section, Defendant shall submit to the United States for approval an updated form(s) of Financial Assurance which takes into account the rate of inflation. If Respondent uses the financial test pursuant to Subparagraph 26.c of this Section, the Current Cost Estimate for the Compliance Requirements must be updated for inflation within 30 days after the close of the company's fiscal year and before submission of the updated form(s) of Financial Assurance to the United States. The adjustment for inflation shall be made by either recalculating the Current Cost Estimate for the Compliance Requirements in current dollars or by using an inflation

factor derived from the most recent annual Implicit Price Deflator for Gross Domestic Product published by the U.S. Department of Commerce in its monthly publication, Survey of Current Business. The inflation factor is derived by dividing the latest published annual Deflator by the annual Deflator for the previous year. (Both figures are currently set forth in Table 7.14 in the Survey of Current Business). The adjustment to the Current Cost Estimate for inflation is then made by multiplying the Current Cost Estimate by the latest inflation factor.

29. If Defendant determines at any time that it is unable, or reasonably expects that it will be unable, to maintain the Financial Assurance provided pursuant to this Section, Defendant shall obtain and submit to the United States for approval one (or a combination) of the other forms of Financial Assurance listed in Paragraph 26 of this Section within thirty (30) calendar days of the earlier of (a) the event that causes such inability, or (2) receipt of information that gives rise to the reasonable expectation of such inability.

30. If the United States determines at any time that the Financial Assurance provided pursuant to this Section is inadequate, Defendant shall, within thirty (30) days of its receipt of notification of such determination, obtain and present to the United States for approval one (or a combination) of the other forms of Financial Assurance listed in Paragraph 26 of this Section.

31. Defendant's inability to demonstrate financial ability to meet the Current Cost Estimate for the Compliance Requirements shall not excuse performance of any activities required under this Consent Decree.

**XV. WAIVER PROVISIONS**

32. Defendant shall not make any claims under any law, directly or indirectly against the United States, for indemnification or contribution by the United States, or make any other claims, for costs, expenses, or damages related to this action or incurred by Defendant under this Consent Decree. Specifically, Defendant waives and releases all claims against, and covenants not to sue, the United States for costs incurred by the Defendant in complying with this Consent Decree. Defendant shall make no claim to the Hazardous Substances Superfund, under any provision of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et seq.

**XVI. FAILURE OF COMPLIANCE**

33. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's complete compliance with this Consent Decree will result in compliance with the provisions of the PCB regulations, TSCA, the Clean Water Act or NPDES Permit No. PA0012726. Notwithstanding EPA's review and approval of any plans formulated pursuant to this Consent Decree, Defendant shall remain solely responsible for compliance with the terms of the PCB regulations, TSCA, the CWA, NPDES Permit No. PA0012726 and this Consent Decree.

**XVII. CONSENT DECREE NOT A PERMIT**

34. This Consent Decree is not and shall not be interpreted to be a permit, or a modification of an existing permit, issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. §1342, nor shall it in any way relieve defendant of the obligation to comply with the

requirements of an NPDES permit or with any other applicable federal or state law or regulation. Any new permit or modification of existing permits must be complied with in accordance with applicable federal and state laws and regulations. The pendency of any proceeding concerning the issuance, reissuance, or modification of any NPDES permit shall neither affect nor postpone defendant's duties and liabilities as set forth in this Decree.

**XVIII. NON-WAIVER PROVISIONS**

35. Compliance with this Consent Decree in no way affects or relieves Defendant of responsibility to comply with any federal, state, or local law or regulation.

36. The work undertaken by Defendant and its contractors or subcontractors pursuant to this Decree shall be performed in compliance with all applicable federal, state and local laws (except to the extent that TSCA preempts such state and local laws) and regulations, and Defendant and/or its contractors or subcontractors shall obtain all permits or approvals necessary under such laws or regulations.

37. This Consent Decree does not limit or affect the rights of Defendant or the United States as against any third-parties, nor does it limit the rights of third-parties, not parties to this Consent Decree, against Defendant.

38. The United States reserves all of its rights and remedies available to enforce the provisions of this Consent Decree.

39. This Consent Decree is intended to resolve all claims under TSCA and the CWA made in the complaint. ★

40. The United States reserves all of its rights and remedies as follows: (1) under all laws, including every provision of all environmental statutes, not specifically pled in the complaint filed in this action; (2) under the Clean Water Act and TSCA to the extent not pled in the complaint in this case; (3) to respond to conditions which may present an imminent and substantial endangerment to the public health, welfare or the environment; (4) under any provision of criminal law; (5) with respect to any portion of the site where environmental conditions have not already been characterized by sampling or other testing, or are not subject to sampling or other testing under the terms of this Consent Decree; (6) with respect to conditions at the site unknown to EPA at the time of entry of this Consent Decree; and (7) for violations of federal or state law that occurred during or after implementation of the remedial action contemplated by this Consent Decree.

41. The remedial action contemplated by this Consent Decree is intended to remedy the violations of law that were the basis for the filing of the complaint. The United States does not warrant and expressly disclaims any interpretation of the Consent Decree that Defendant's compliance with the terms of this Consent Decree renders the facility safe or appropriate for any future use.

42. During the course of the work contemplated by this Decree, Defendant shall be responsible for promptly responding to any emergencies or releases at the facility and notifying the proper governmental authorities as required by federal, state or local laws and regulations.



XIX. COSTS OF SUIT

43. Each party shall bear its own costs and attorney's fees in this action. Should Defendant subsequently be determined to have violated the terms and conditions of this Consent Decree, then Defendant shall be liable to the United States for any costs and attorney's fees incurred by the United States in any action against Defendants for noncompliance with this Decree.

44. Except as otherwise specified, notification to or communication with the parties required by the terms of this Consent Decree shall be as follows:

As to the U.S. Department of Justice:

Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611 Ben Franklin Station  
Washington, D.C. 20044  
DOJ Ref. No. 90-5-1-1-3719

CATHERINE VOTAW  
Assistant United States Attorney  
615 Chestnut Street  
Philadelphia, PA 19107

As to the U.S. EPA:

Chief, TSCA Enforcement and TRI Section  
Air, Radiation & Toxics Division  
United States Environmental Protection  
Agency, Region III  
841 Chestnut Building (Mailcode - 3AT31)  
Philadelphia, PA 19107

As to Defendants:

MITCHELL BURACK, Esquire  
 Pepper, Hamilton and Scheetz  
 3000 Two Logan Square  
 18th and Arch Streets  
 Philadelphia, PA 19103

Richard M. Harris, Contract Manager  
 Cressona Aluminum Company  
 Pottsville Street  
 Cressona, Pennsylvania 17929-0129

45. Notifications to or communications between EPA or the United States and Defendant shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested.

**XX. MODIFICATION**

46. Except as specifically provided for herein, or upon order of the Court sua sponte, or upon petition of a party, there shall be no modification of this Consent Decree without written approval of all of the parties to this Consent Decree and the Court.

**XXI. PUBLIC COMMENT**

47. The parties agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments received.

**XXII. CONTINUING JURISDICTION**

48. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

### XXIII. CERTIFICATION

49. Any notice, report, certification, data presentation or other document submitted by Defendant under or pursuant to this Consent Decree, which discusses, describes, demonstrates, supports any finding or makes any representation concerning Defendant's compliance or non-compliance with any requirement(s) of this Consent Decree shall be certified by a responsible official of Defendant. The term responsible official shall mean:

50. A responsible corporate officer. A responsible corporate officer means: (a) A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision making functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$35 million (in 1987 dollars when the consumer price Index was 345.3), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

51. The certification of the responsible official shall be in the following form:

"I certify that the information contained in  
or accompanying this (type of submission) is  
true, accurate and complete."

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

**XXIV. NONSEVERABILITY**

52. The provisions of this Decree shall be severable, and should any provision be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions of this Decree shall remain in full force and effect.

53. This is the entire agreement among the parties, and, except upon Order of the Court, no alterations, additions, or agreements shall be valid unless in writing, executed by the parties, and entered by this Court in accordance with Section XIX of the Decree.

**XXV. TERMINATION**

54. This Consent Decree shall remain in full force and effect until Defendant has paid all penalties due, completed all requirements of this Consent Decree, and EPA has determined that Defendant has satisfactorily achieved complete compliance with the Consent Decree as indicated by a letter to the Court from the United States. Defendant may thereafter request the Court to terminate the Consent Decree.

55. Cressona may petition the Court to terminate Section VII, Paragraph 5 of this Decree when Cressona is able to establish that it has maintained full compliance with the conditions and limitations set forth in its NPDES permit for 12 consecutive months, all of which months must occur after the lodging of this Decree. The issuance of a new NPDES permit or the reissuance of NPDES Permit No. PA0012726 shall in no way relieve Cressona of its obligation to maintain full compliance, as set forth in this paragraph, for 12 consecutive months. If Cressona's NPDES permit is reissued or amended or Cressona is issued

a new NPDES permit, Cressona's compliance shall be established in accordance with the reissued, amended or new permit.

56. Cressona may petition the Court to terminate Section VII, Paragraph 6 of this Decree when Cressona is able to establish that it has not had a discharge of a pollutant or pollutants not authorized by Cressona's NPDES permit for a period of 12 consecutive months, all of which months must occur after the lodging of this Decree.

57. Cressona may petition the Court to terminate Section VII, Paragraph 7 when Cressona has completed all reporting requirements of this Decree.